

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JACK L. MORRIS,

No. C 06-5015 SI (pr)

Plaintiff,

**ORDER GRANTING SUMMARY  
JUDGMENT IN PART; DENYING  
DISCOVERY MOTIONS; AND FOR  
SCHEDULING**

v.

JOE McGRATH; et al.,

Defendants.

**INTRODUCTION**

Jack L. Morris, an inmate at a state prison in Tehachapi, filed this pro se civil rights action under 42 U.S.C. § 1983 alleging that defendants were deliberately indifferent to his serious medical needs while he was incarcerated at Pelican Bay State Prison. Defendants who have been served now move for summary judgment. For the reasons discussed below, the motion for summary judgment will be granted as to all but two defendants. The court will also address several pending discovery and miscellaneous matters.

**BACKGROUND**

Morris sues numerous defendants for deliberate indifference to his serious medical needs based on their actions in his sixteen-month quest to obtain special shoes and care for cuts and abrasions on his claw toes. The following facts are treated as undisputed for purposes of the pending motion.

The events that give rise to the claims in the complaint occurred between October 2003 and February 2005 at Pelican Bay State Prison.

1 During the relevant time, Morris was confined in the security housing unit ("SHU") at  
2 Pelican Bay, where he had been since April 1991. For the vast majority of hours in each day,  
3 he was confined to his cell.

4 Morris had a condition "called 'claw-toe' or 'hammer toe' which caused the toes on both  
5 [his] feet to be pulled back and upwards more so than people who do not suffer from this  
6 condition." Morris Decl., ¶ 5. He states that the condition may be addressed surgically or by  
7 special footwear, and that he has been receiving the footwear for more than twenty years. He  
8 had received all-leather tennis shoes for ten years at Pelican Bay. When he wore the regular  
9 canvas shoes that Pelican Bay provided, the tops of his clawed toes rubbed the toe box of the  
10 shoe. The rubbing caused blisters on his toes, more rubbing caused the blisters to pop, and more  
11 rubbing caused the skin to abrade and eventually to bleed. Morris states that the pain from his  
12 cut toes was occasionally extreme. These cuts on his various toes were about the size of the  
13 upper portion of his pinkie finger or maybe a half-inch wide. Morris Depo., RT 96.

14  
15 A. The Shoes and Shoe Chrono

16 From time to time during his many years of incarceration, Morris had a medical chrono  
17 that authorized him to have special shoes because of his claw toes. A "chrono" is prison  
18 parlance for a memorandum and is occasionally referred to as a CDC-128, as that is the number  
19 of the form on which a chrono is written. The chrono at issue here was a memorandum from  
20 prison medical staff that authorized Morris to have special shoes.

21 There is no evidence that the special shoes in question had any healing or curative  
22 powers. Rather, they made walking with claw toes more tolerable, just as a cane may have no  
23 therapeutic value but may make walking with an arthritic hip more tolerable. Morris had a  
24 chrono written on January 17, 2003 that authorized state-issued white leather tennis shoes for  
25 a year. A few months before the chrono expired, Morris started his efforts to renew it. The  
26 special shoes issued in March 2003 had "begun to wear out" by October 2003. Morris Depo.,  
27 RT 25.

28 On October 3, 2003, Morris sought to renew the shoe chrono and also sought new special

1 shoes. Other footwear was available to Morris at this time. He had a pair of shower shoes  
2 (consisting of foam soles with plastic bands to hold his feet) but chose not to wear them outside  
3 his cell. Morris Depo., RT 29. He was not prohibited from wearing the shower shoes outside  
4 his cell, RT 29, 33, but he didn't wear them because he wanted to be ready for inmate attacks,  
5 RT 69. He also may have had his old special shoes, but they had begun to wear out, RT 25, and  
6 he may have had more than two pairs of all-leather shoes in his cell, RT 25, 33-34.

7 On October 5, 2003, Morris spoke with medical technical assistant ("MTA") Owen, who  
8 told Morris to send a him a copy of the shoe chrono. Morris did, and on October 8, 2003, Owen  
9 informed Morris he had sent the paperwork to the medical purchasing department. After not  
10 hearing anything about the request for a while, Morris contacted Owen on November 23, 2003.  
11 Owen told him that the type of shoe previously issued had been discontinued and a new soft sole  
12 type of shoe was being ordered for the prison. Owen did not know when they would arrive.

13 MTAs are not authorized to issue medical chronos to inmates.

14 Dr. Rowe was Morris' primary care provider in October 2003. She considered his request  
15 of a renewal of the shoe chrono. Her physician's progress notes for October 3, 2003 noted that  
16 the existing chrono did not expire until January 17, 2004, noted that the chrono should be  
17 renewed or reviewed in early January 2004, and noted to ask the inmate to request a renewal of  
18 the chrono in January 2004. Complaint, Exh. B. These physician's notes did not mention a  
19 request for new shoes, although Morris had submitted the request for new shoes to MTA Owen.  
20 Complaint, Exh. C.

21 On December 1, 2003, Morris' feet began to bleed from cuts on his toes during his  
22 exercise session in regular state-issued shoes. Morris submitted a sick call form, and another  
23 form five days later when he had not seen any medical personnel. On December 9, 2003, he  
24 spoke with nurse Garrett, and told her that his feet were cut, bleeding and causing him pain.  
25 Garrett visually examined his feet and said he needed to see a doctor, but declined to give him  
26 something for his pain at that moment. Morris was seen by Dr. Rowe the next day (December  
27 10, 2003). Dr. Rowe had an MTA clean Morris' toes, and put antibiotic ointment and bandaids  
28 on them. She also ordered that Morris be seen by a podiatrist. Dr. Rowe told him she could not

1 order shoes for him and that he had to see the podiatrist.

2 Morris was seen by Dr. Alway, the podiatrist, on February 5, 2004. Dr. Alway  
3 documented Morris' need for the shoes and had nurse Vail clean and dress Morris' toes. At the  
4 appointment, nurse Vail told Morris that a different doctor had to order the shoes and that she  
5 could only make the recommendation.

6 Dr. Rowe ceased being Morris' primary care provider in February 2004 when she moved  
7 out of his SHU facility. Dr. Rowe was replaced by certified family nurse practitioner ("FNP")  
8 Risenhoover, who was Morris' primary care provider from February 2004 through February  
9 2005.

10 On February 17, 2004, FNP Risenhoover referred Morris to the orthopedic specialist after  
11 Morris told her he was having trouble getting the shoes Dr. Alway had recommended.

12 Morris states that FNP Risenhoover told him on March 16, 2004 that she had received  
13 a memo directing her not to issue the shoes. A note in the medical records indicates that shoe  
14 requests were suspended until a special medical authorization review committee meeting took  
15 place in April. See Morris Decl., ¶ 70, Exh. B at AG0-133.

16 On April 6, 2004, defendant Worch came to Morris' cell to discuss an inmate appeal.  
17 Worch was a staff services analyst for medical appeals who reviewed and investigated inmate  
18 medical appeals but did not have any authority to decide the outcome of any medical appeal and  
19 had no responsibility to provide medical care to an inmate. Morris states that Worch told him  
20 that, if she granted his appeal, he would receive boots and not tennis shoes. Morris took the  
21 boots Worch had in her hands, after telling her that boots had not worked in the past but that he  
22 would try them again.

23 On April 22, 2004, Morris wrote a letter to Risenhoover and nurse Garrett complaining  
24 of his problems and asking for medical treatment for his cuts on his toes and his pain.

25 On April 30, 2004, Morris was called to the clinic and was examined by FNP  
26 Risenhoover. Risenhoover cleaned and dressed Morris' toes with antibiotic ointment and  
27 bandaids and directed MTA Aanerud to supply him with extra ointment and bandaids to take  
28 back to his cell, but she did not give him medications for his complaints of pain related to his

1 feet. Morris told FNP Risenhoover that he had not yet seen the orthopedic specialist. He states  
2 that she left the room, then returned and told him the nurse in the specialty clinic had  
3 inadvertently removed his name from the list for access to the specialty clinic. FNP Risenhoover  
4 also told Morris the shoe policy had changed and that an earlier program that allowed SHU  
5 inmates to purchase shoes had been reinstated.

6 An orthopedic appointment was scheduled for May 12, 2004. Morris missed the  
7 appointment because he was in the law library and was unaware of the appointment.

8 On May 25, 2004, Folsom examined Morris' toes and gave him bandaids, but refused to  
9 provide antibiotic ointment or aspirin. Folsom told Morris to write to the specialty clinic.

10 On May 26, 2004, Morris was taken to the specialty clinic, where he spoke to Mike  
11 Billington. Billington declined to examine Morris' feet, stating that he was not a doctor.  
12 Billington also stated that he could not write a shoe chrono because he wasn't a doctor.  
13 Billington suggested that Morris should buy shoes before the program changed again. Morris  
14 told Billington he was indigent and that the prison was required to purchase the shoes for him.<sup>1</sup>  
15 Billington then called nurse Vail into the room "to explain the procedure to Plaintiff for  
16 acquiring special shoes. Part of [her] explanation was that M. Billington was not authorized to  
17 write a medical chrono and that only a primary care provider was authorized to write a medical  
18 chrono for shoes." Vail Decl., ¶ 4.

19 A chrono was written on June 4, 2004, authorizing Morris to purchase "high-top, soft-sole  
20 tennis shoes from state-approved outside vendor" for a year. See Complaint, Exh. PP. Dr.  
21 Winslow signed the chrono that was written by Dr. Allen. Although he was told on June 8 that  
22 the chrono had been written, Morris didn't receive it until about August 2004.

23 On August 26, 2004, Morris wrote to a nurse that he had recently received the chrono for  
24 the shoes. On September 6, 2004, a copy of his paperwork was returned with a notation that he  
25 had to pay for his shoes. Complaint, Exh. PP.

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27 <sup>1</sup>Notwithstanding his assertion of indigence, Morris at the time had hundreds of dollars  
28 in his inmate account. See Motion For Leave to Proceed In Forma Pauperis and December 23,  
2004 Order To Show Cause Re. Pauper Status in Morris v. McGrath, C 04-3142 SI.

1 On October 25, 2004, FNP Risenhoover told Morris the paperwork had been written but  
2 not processed for him to get him to an orthopedic specialist. FNP Risenhoover also told Morris  
3 she would speak to MTA Alison to investigate why the paperwork had not been processed.

4 On December 1, 2004, FNP Risenhoover told Morris he had been approved to see the  
5 orthopedic specialist, but that she did not know when the visit would take place.

6 On December 21, 2004, Morris went to the specialty clinic, where he saw Mike Billington  
7 again. Billington asked Morris' shoe size and told Morris he was ordering the shoes.

8 Morris received the shoes in February 2005. The shoes were Reebok all leather high-top  
9 tennis shoes.

10  
11 B. Attention To Morris' Toes

12 In addition to making numerous requests for the chrono and the special shoes, Morris  
13 repeatedly requested bandaids, antibiotic ointment, and pain relief for the cuts on his feet due  
14 to wearing the ill-fitting regular shoes. The undisputed evidence shows Morris received medical  
15 attention for his cuts on his toes repeatedly, although often not promptly. Usually, the care  
16 consisted of bandaids and neosporin or other antibiotic ointment, although he also once received  
17 an oral antibiotic and sometimes received pain medication.

18 Morris first complained of the cuts on his feet on or about December 1, 2003. About six  
19 days later, nurse Garrett examined his feet at the pod door, and told him he needed to see a  
20 doctor. On December 10, he saw Dr. Rowe, who had an MTA treat and clean his toes. Her  
21 notes indicate that he had abrasions and claw feet, and ordered bacitracin ointment for ten days.  
22 Complaint, Exh. E.

23 Morris filed another sick call slip on December 22-23 and complained to several nurses  
24 and MTAs thereafter, and states that he did not receive antibiotic ointment or bandaids for them  
25 until January 26, 2004, although the medical records indicate that his toes were not ignored for  
26 that month. A nurse's note dated December 23 states that frank bleeding was not observed and  
27  
28

1 that Morris had been instructed to cease wearing shoes.<sup>2</sup> Complaint, Exh. G. A doctor's note  
2 from December 31, 2003 shows that the bacitracin ointment was renewed. Complaint, Exh. H.  
3 Nurse Garrett's notes for January 13 state that Morris was seen at the pod front, at which time  
4 he had red open areas on top of his toes but no signs of infection; her plan was for him to avoid  
5 wearing shoes as much as possible. Complaint, Exh. J. Morris' toes were cleaned and dressed  
6 at the podiatrist appointment on February 5, 2004.

7 On February 17, Risehnoover made a note that his right toes had no sores and his cuts had  
8 healed on his left toes that had healed had returned the day before while wearing regular shoes.  
9 Complaint, Exh. T. Dressing was applied to the abrasions and the plan was for him to keep the  
10 abrasions clean and dry. Id.

11 At an appointment on March 16, 2004, antibiotic ointment and bandaids were put on the  
12 toes and Morris was provided with additional bandaids and antibiotic ointment (i.e., neosporin)  
13 to take care of his toes.<sup>3</sup> Risenhoover also ordered Tylenol for 30 days. Morris Decl., Exh. O.

14 On April 2 and April 10, he submitted sick call slips, but didn't receive care until April  
15 30, at which time Risenhoover cleaned and dressed his toes, and directed an MTA to supply  
16 him with additional ointment and bandaids. Complaint, Exh. dd. Tylenol was ordered for 90  
17 days, although it is not clear whether that was for his toe problems or other medical problems.  
18 Id.

19 On May 25, he was given additional bandaids, but not the requested ointment or aspirin  
20 (although he had received an order for Tylenol for 90 days less than a month earlier).

21 On September 6, he submitted a sick call slip and was provided with bandaids and  
22 neosporin on September 14. On September 16, he was called to the drop-in clinic, where a  
23 doctor examined his toes which had become infected. The doctor ordered a 7-day oral antibiotic,  
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25 <sup>2</sup>"Frank" is defined as unmistakable, manifest, and clinically evident. Stedman's Medical  
26 Dictionary (24th ed.), p. 562. Thus, the nurse's note of "0 frank bleeding" appears to mean that  
no bleeding was observed.

27 <sup>3</sup>Morris was also instructed by FNP Risenhoover to take alternative measures (e.g., wear  
28 two pairs of socks and keeping his shoe laces loose) to help his toes. There is no evidence that  
he tried either of those measures.



1 as well as the antibiotic ointment, bandaids, and antiseptic swabs for 14 days. On September  
2 20, he submitted a request stating he had run out of ointment, swabs and bandaids; at the time  
3 he also declined to go to the clinic for a change of the dressing on his toes because he had  
4 dressing in his cell to care for his toes.

5 FNP Risenhoover on September 22 cleaned and applied new dressing to the toes. On  
6 October 1, Morris submitted a sick call request asking for more bandaids, ointment and swabs,  
7 but the request was returned unfilled from the pharmacy because he had no medical order for  
8 those supplies.

9 On October 25, Risenhoover re-dressed his cuts with ointment and bandaids, and told him  
10 to submit a form to nurse Allison when he needed to get new supplies. Two days thereafter,  
11 Allison came to his cell with additional bandaids, ointment and swabs. He apparently had  
12 supplies for at least a month, as some bandaids were confiscated during a cell search on  
13 November 27. He submitted another request for ointment, swabs and bandaids on November  
14 29, and received them three days later.

15 On December 1, FNP Risenhoover ordered more bandaids and antibiotic ointment for  
16 cuts on four toes, but declined to provide pain killers to Morris. MTA Folsom came to the pod  
17 door that night with medicine, but left before giving them to Morris because Morris did not  
18 comply with his orders for retrieving the supplies. Although Morris now contends that  
19 withholding the medicine was unjustified, his description of the incident in an inmate appeal  
20 filed at the time shows that, in fact, he was not complying with Folsom's order. Compare Morris  
21 Decl., ¶ 158 with Morris Decl., Exh. K, third page. In that inmate appeal, Morris complained  
22 that Folsom had not waited for compliance with Folsom's order for Morris to retrieve the  
23 medicine at the pod door so that Morris could first do what Morris wanted (i.e., return to his cell  
24 to retrieve documents). As a result of these events, Folsom left without handing the medicine  
25 to Morris. Morris received the supplies on December 9, 2004. Complaint, Exh. BBB; Morris  
26 Decl., Exh. K, § D.



C. Complaints To Prison Administrators

Morris wrote letters to Dr. Dwight Winslow, the prison's chief medical officer in January, February and December, 2004, describing his toe problems and inability to get his shoe chrono and shoes. Dr. Winslow also responded to Morris' inmate appeal in February 2004.

Morris also contacted administrative officials outside the medical department to complain about the allegedly inadequate medical care for his foot condition. He states that he sent letters to defendants McGrath, Kirkland, O'Neill and Castellaw in January, March, May and December of 2004. None of these defendants recalls receiving any letter from Morris about his foot problems, but each stated that if he did receive a letter, he would have acted in conformance with his normal practice of forwarding the letter to Dr. Winslow, the chief medical officer, who was responsible for ensuring that medical care was provided to inmates. The evidence is undisputed that shortly after each letter was sent, Morris received attention. After his January 15 letter, Morris saw Dr. Rowe on January 26 and the podiatrist on February 5; after his March 21 letter, he received boots from a medical appeals reviewer on April 6; after his May 11 letter, he missed an appointment on May 12 and a shoe chrono was issued within a month; and after his December 5 letter, he went to the specialty clinic on December 21 where Billington took his shoe size to order the shoes.

**VENUE AND JURISDICTION**

Venue is proper in the Northern District of California because the events or omissions giving rise to the claims occurred at Pelican Bay State Prison in Del Norte County, which is located within the Northern District. See 28 U.S.C. §§ 84, 1391(b). This Court has federal question jurisdiction over this action brought under 42 U.S.C. § 1983. See 28 U.S.C. § 1331.

**LEGAL STANDARD FOR SUMMARY JUDGMENT**

Summary judgment is proper where the pleadings, discovery and affidavits show that there is "no genuine issue as to any material fact and [that] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A court will grant summary judgment

1 “against a party who fails to make a showing sufficient to establish the existence of an element  
2 essential to that party’s case, and on which that party will bear the burden of proof at trial . . .  
3 since a complete failure of proof concerning an essential element of the nonmoving party’s case  
4 necessarily renders all other facts immaterial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322-23  
5 (1986). A fact is material if it might affect the outcome of the lawsuit under governing law, and  
6 a dispute about such a material fact is genuine “if the evidence is such that a reasonable jury  
7 could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242,  
8 248 (1986).

9 Generally, when a party challenges the merits of the opponent's claim, the moving party  
10 bears the initial burden of identifying those portions of the record which demonstrate the absence  
11 of a genuine issue of material fact. The burden then shifts to the nonmoving party to "go beyond  
12 the pleadings, and by his own affidavits, or by the 'depositions, answers to interrogatories, or  
13 admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324 (citations omitted).

15 A verified complaint may be used as an opposing affidavit under Rule 56, as long as it  
16 is based on personal knowledge and sets forth specific facts admissible in evidence. See  
17 Schroeder v. McDonald, 55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995) (treating plaintiff's  
18 verified complaint as opposing affidavit where, even though verification not in conformity with  
19 28 U.S.C. § 1746, plaintiff stated under penalty of perjury that contents were true and correct,  
20 and allegations were not based purely on his belief but on his personal knowledge).

21 The court's function on a summary judgment motion is not to make credibility  
22 determinations or weigh conflicting evidence with respect to a disputed material fact. See T.W.  
23 Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). The evidence  
24 must be viewed in the light most favorable to the nonmoving party, and the inferences to be  
25 drawn from the facts must be viewed in a light most favorable to the nonmoving party. See id.  
26 at 631.

**DISCUSSION****A. Motion For Summary Judgment**

Deliberate indifference to a prisoner's serious medical needs violates the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104 (1976). A prison official violates the Eighth Amendment only when two requirements are met: (1) the deprivation alleged is, objectively, sufficiently serious, and (2) the official is, subjectively, deliberately indifferent to the inmate's health or safety. See Farmer v. Brennan, 511 U.S. 825, 834 (1994). Accordingly, evaluating a claim of deliberate indifference necessitates examining the seriousness of the prisoner's need and the nature of the defendant's response. See McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).

A "serious" medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain." Id. The existence of chronic and substantial pain is an example of an indication that a prisoner has a serious need for medical treatment. See id. at 1059-60.

Although it is close, there is a triable issue of fact that the need for special shoes to accommodate claw toes qualifies as a serious medical need. It is an even closer call, but there is a triable issue of fact that the cuts and abrasions not larger than a half-inch in size on the claw toes qualify as a serious medical need. Taking the evidence and inferences therefrom in the light most favorable to the non-movant, a reasonable jury could conclude that Morris had needs that satisfied the objective prong for his Eighth Amendment claim. As a result, the analysis proceeds to the second prong of the Eighth Amendment.

A prison official exhibits deliberate indifference when he knows of and disregards a substantial risk of serious harm to inmate health. See Farmer, 511 U.S. at 837. The official must both know of "facts from which the inference could be drawn" that an excessive risk of harm exists, and he must actually draw that inference. Id. A mere difference of opinion as to which medically acceptable course of treatment should be followed does not establish deliberate indifference. See Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). Where doctors have

1 chosen one course of action and a prisoner-plaintiff contends that they should have chosen  
2 another course of action, the plaintiff “must show that the course of treatment the doctors chose  
3 was medically unacceptable under the circumstances, . . . and the plaintiff must show that they  
4 chose this course in conscious disregard of an excessive risk to plaintiff’s health.” Jackson v.  
5 McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

6       Where, as here, there was some response but the complaint is about the timeliness of that  
7 response to the medical condition, the temporal component is best considered as part of the  
8 subjective prong rather than the objective prong of the deliberate indifference test. See, e.g.,  
9 Plemmons v. Roberts, 439 F.3d 818, 823-24 (8th Cir. 2006) (response to complaints of heart  
10 attack symptoms). The need for speed goes to whether the official took the “reasonable  
11 measures” mentioned in Farmer, 511 U.S. at 837. It is not the law that anything other than  
12 instantaneous response to any medical complaint is an Eighth Amendment violation, as both  
13 incarcerated and unincarcerated people must endure some waiting time for almost any medical  
14 care, whether it be a few hours in an emergency room or a few months for a doctor appointment.  
15 Although the response time and the quality of the response fit under the subjective prong, the  
16 objective condition also must be kept in mind when determining the reasonableness of the  
17 response. For example, while both high blood pressure and heart attacks are serious, the need  
18 for immediate medical attention to the latter is far greater and a response time of one month  
19 might be acceptable for high blood pressure but wholly unacceptable for a heart attack. The  
20 Eighth Amendment analysis in a delayed response case requires a plaintiff to prove (or, at the  
21 summary judgment stage, to raise a triable issue of fact) that a delay occurred to an inmate with  
22 a problem so severe that a delay would cause significant harm and that the defendant knew this  
23 to be the case. Cf. Hallett v. Morgan, 296 F.3d 732, 746 (9th Cir. 2002).

24       There are triable issues of fact as to whether defendant Risenhoover and defendant  
25 Winslow were deliberately indifferent to Morris’ need for footwear. Morris has not raised a  
26 triable issue of fact as to the other defendants, however. There is evidence from which a  
27 reasonable trier of fact could conclude that the primary care provider (FNP Risenhoover) and  
28 the health care manager (Dr. Winslow) had the responsibility and ability to cause the shoes to

1 be obtained for Morris, that they were aware that Morris hadn't received the shoes in a timely  
2 manner, and that they were deliberately indifferent as they delayed and failed to cause those  
3 shoes to be obtained in a timely manner.

4 Risenhoover: Morris' primary care provider from about February 2004 to February 2005  
5 was Sue Risenhoover, a certified family nurse practitioner. During this time, FNP Risenhoover  
6 saw Morris numerous times, treated him for cuts on his toes, knew he had claw toes, and knew  
7 he wanted new shoes for his claw toe condition. She declared that every time Morris visited her  
8 for foot problems, she "ensured that he was treated with band-aids and/or over-the-counter  
9 ointments and medications *if* his injuries warranted such treatment." Risenhoover Decl., ¶ 8.  
10 Her declaration does not describe her efforts with regard to Morris' requests for special shoes  
11 or a chrono allowing special shoes, and Morris' evidence regarding her efforts indicate less than  
12 vigorous efforts. Morris states that he complained to FNP Risenhoover that he had not received  
13 his shoes, but her declaration is noticeably silent on what she did when he alerted her to the fact  
14 that he had not received the shoes he had been trying to get for many months. When faced with  
15 obvious evidence that the system wasn't working, it appears that FNP Risenhoover stuck with  
16 the system for getting new shoes. "[O]nly a primary care provider was authorized to write a  
17 medical chrono for shoes," Vail Decl., ¶ 4, and Risenhoover knew that MTAs were not  
18 authorized to write a medical chrono, yet there is no evidence as to why Risenhoover did not  
19 sign a shoe chrono for Morris; if she lacked authority to do so, there is no evidence of what she  
20 did do to promptly get the matter to a doctor who could sign that shoe chrono.

21 By contrast, the evidence clearly shows that FNP Risenhoover reasonably did attend to  
22 the toe abrasions and cuts when she saw Morris. She treated and dressed the cuts and bleeding  
23 when Morris saw her, and sometimes provided pain relievers. That he believes he should have  
24 been provided pain relievers more frequently is insufficient to raise a triable issue of fact in light  
25 of her professional judgment that she gave him the treatments warranted by his injuries and the  
26 evidence that shows that he wasn't in such pain that he wore the other shoes available to him or  
27 spent his own money to buy the shoes that could have solved the problem of the abrasions.  
28 Considering the evidence and drawing the inferences therefrom in Morris' favor, no reasonable

1 jury could conclude that Risenhoover was deliberately indifferent in her response to Morris'  
2 cuts, bleeding and complaints of pain.

3 Winslow: A reasonable trier of fact could find that Dr. Winslow acted with deliberate  
4 indifference to Morris' serious medical need for special shoes. Dr. Winslow's liability does not  
5 rest on an impermissible respondeat superior theory (i.e., that he would be liable merely because  
6 he was in charge of an organization in which the tortfeasor was employed). Rather, Dr.  
7 Winslow's role in this case is much more involved. He was informed by Morris in letters Morris  
8 wrote directly to him, as well as in letters that the prison administrators forwarded to him to take  
9 care of because he was the chief medical officer for the prison. Even if, as Dr. Winslow states  
10 in his declaration, he looked at the patient's records to be sure he had an upcoming appointment,  
11 a reasonable trier of fact could conclude that that was not an adequate response to Morris' letters.  
12 The gist of Morris' letters was that he wasn't getting the desired results rather than merely that  
13 he wasn't getting an appointment, and Dr. Winslow's actions that consisted only of being sure  
14 that an appointment existed could be seen by a reasonable trier of fact to amount to deliberate  
15 indifference.

16 Dr. Rowe: Dr. Rowe is entitled to judgment as a matter of law. The undisputed evidence  
17 is that she was Morris' primary care provider in the period from October 2003 through February  
18 2004, during which time she did nothing that a reasonable jury could conclude amounted to  
19 deliberate indifference. Dr. Rowe reviewed Morris' chart in October 2003 and determined that  
20 it was premature to renew the shoe chrono, which did not expire for three more months. That  
21 a patient may have been anxious to avoid a lapse in medical care does not show or support an  
22 inference that he did not receive medical care when the doctor did not prematurely renew a  
23 chrono. Dr. Rowe had Morris' toes cleaned and had antibiotic ointment and bandaids put on  
24 them when she saw him on December 10, 2003 for complaints about his toes. At that same  
25 appointment, she ordered that Morris be seen by a podiatrist so that the shoe issue could be  
26 considered. Morris was seen by the podiatrist on February 5, 2004. Dr. Rowe then had no  
27 further role in Morris' care. Based on the evidence in the record, no reasonable juror could  
28 conclude that she exhibited deliberate indifference to Morris' foot condition or shoe request.

1        The Administrative Defendants: Defendants McGrath, Kirkland, O'Neill and Castellaw  
2 are entitled to judgment as a matter of law. These are prison administrators who Morris believes  
3 are liable because he sent letters to them complaining about his problems with his feet. None  
4 of these defendants recalled receiving any letter from Morris about his foot problems, but each  
5 stated that if he did, he would have acted in conformance with his normal practice of forwarding  
6 the letter to the director of the medical department, who was responsible for ensuring that care  
7 was provided to inmates. The evidence that the defendants would have forwarded any letters  
8 to Dr. Winslow coupled with the evidence that some attention was given to Morris within a short  
9 period of time after each letter allows an inference that the letters were sent to Dr. Winslow, and  
10 Morris' speculation that these defendants did nothing is insufficient to raise a triable issue of fact.  
11 The undisputed evidence that the administrative defendants would have forwarded medical care  
12 requests to the head of the medical department makes this case distinguishable from Jett v.  
13 Penner, 439 F.3d 1091, 1098 (9th Cir. 2006), in which the court determined that the evidence  
14 that a prisoner-plaintiff wrote to a prison warden asking for help with a medical problem was  
15 sufficient to generate a genuine issue of material fact as to whether the warden was deliberately  
16 indifferent in failing to act. Unlike the warden in Jett, the administrative defendants in Morris'  
17 case did not simply deny receiving his letters, but instead stated they didn't recall receiving the  
18 letters and that, if they had received them, they would have acted in accord with the normal  
19 practice of sending them to the head of the medical department for him to deal with as a medical  
20 matter. The response is a reasonable one in a large organization with a division of labor, and did  
21 not amount to deliberate indifference. See Spruill v. Gillis, 372 F.3d 218, 236 (3d Cir. 2004) ("If  
22 a prisoner is under the care of medical experts . . . a non-medical prison official will generally  
23 be justified in believing that the prisoner is in capable hands," and therefore prison officials  
24 cannot be considered deliberately indifferent "simply because they failed to respond directly to  
25 the medical complaints of a prisoner who was already being treated by a prison doctor").

26        The Nurses And MTAs: Defendants Martinho-Hatter, Ricci, Garrett, Carr, Becker,  
27 Owen, Vail, Mills, Folsom and Aanerud are entitled to judgment as a matter of law. These are  
28 the MTAs and nurses at the prison who dealt with Morris' complaints about his toes and shoes.



1 No evidence has been presented that any of these defendants could issue the shoe chrono that  
2 was necessary for Morris to obtain the shoes, nor that any of these defendants could issue the  
3 shoes. The problem was higher up in the medical department, as apparently a doctor and/or  
4 primary care provider had to sign the shoe chrono for the shoes to be issued. No reasonable jury  
5 could conclude that these defendants acted with deliberate indifference to the shoe and shoe  
6 chrono problems.

7 Nor could any reasonable jury conclude that these defendants acted with deliberate  
8 indifference to the condition of the toes. Morris' abraded toes that occasionally bled were not  
9 such an urgent condition that the delays he has identified amounted to deliberate indifference  
10 to a serious medical need. Morris was advised to cease wearing the bothersome shoes, but chose  
11 not to do so. The toes were almost always treated with the minor measure of neosporin and  
12 bandaids. No more serious measure was identified as necessary to deal with the cuts. Only once  
13 did the situation require an oral antibiotic, and only occasionally did the situation require pain  
14 medication – but even as to these occasions, there was no evidence that the MTA and nurse  
15 defendants were authorized to provide oral antibiotics or pain medication. The treatment of the  
16 cuts on Morris' feet may have been too slow for Morris, but the evidence does not support a  
17 finding that the defendants acted with the deliberate indifference required to make them liable  
18 for an Eighth Amendment violation.

19 Morris points particularly to December 1, 2004, as an instance of denial of medical care,  
20 stating that MTA Folsom denied medicine – apparently bandaids and ointment – ordered by a  
21 doctor. Morris fails to show a triable issue of fact that MTA Folsom acted with deliberate  
22 indifference. Although Morris now contends that withholding the medicine was unjustified, his  
23 description of the incident in an inmate appeal filed at the time shows that, in fact, he was not  
24 complying with the order and instead was trying to do what he wanted to (i.e., return to his cell  
25 to retrieve documents). Morris has not raised a triable issue of fact that the MTA refused to give  
26 him medicine in deliberate indifference to a serious medical need.

27  
28 Worch: Defendant Worch was an inmate appeals investigator who interviewed Morris

1 regarding an inmate appeal. During that interview, she gave Morris a pair of boots to try.  
2 Morris states that he told her that boots had not worked in the past but agreed to try these boots  
3 to see if they might take care of his problems. Morris has not raised a triable issue of fact that  
4 Morris acted with deliberate indifference to his medical needs. Worch is entitled to judgment  
5 as a matter of law.

6 Viewing the evidence and inferences therefrom in the light most favorable to Morris, a  
7 reasonable jury could not conclude that defendants Rowe, McGrath, Kirkland, O'Neill,  
8 Castellaw, Martinho-Hatter, Ricci, Garrett, Carr, Becker, Owen, Vail, Mills, Folsom, Aanerud  
9 or Worch knew that Morris had a serious medical need and deliberately disregarded it. These  
10 defendants are entitled to judgment as a matter of law in their favor on the merits of Morris'  
11 claim. They also are entitled to judgment as a matter of law on the defense of qualified  
12 immunity because there was no constitutional violation. See Saucier v. Katz, 533 U.S. 194, 201  
13 (2001).

14 Triable issues of fact on the deliberate indifference claim exist as to defendants  
15 Risenhoover and Winslow. These same triable issues of fact that require denial of their motion  
16 on the merits of the Eighth Amendment claim also require rejection of their argument that they  
17 are entitled to qualified immunity.

18  
19 B. Miscellaneous Motions

20 1. Motion For Appointment Of Counsel

21 Plaintiff's third motion for appointment of counsel is DENIED for the same reasons stated  
22 in the December 5, 2006 order denying his first motion for appointment of counsel. (Docket #  
23 103.) Even though this case will be proceeding to trial, the factual and legal issues are not so  
24 complex that Morris will have any real difficulties representing himself at trial.

2. Plaintiff's Subpoenaes

Plaintiff filed a "motion for an order to compel subpoena duces tecum" on February 5, 2009. Defendants opposed the motion, arguing that the subpoenas on non-parties were not properly served and requested materials that were privileged, protected and irrelevant. Plaintiff then filed a motion for an extension of time to file a reply, claiming a need for additional time because his legal materials had been confiscated at the prison at which he is currently housed. (The separation of plaintiff from his legal materials is not alleged to have been caused by defendants.) Plaintiff sought an extension of time almost five months ago, but never filed a reply, although he did file several other documents. The court need not wait further for a reply brief from plaintiff, because plaintiff's motion plainly shows that he did not properly serve the subpoenas: plaintiff states under penalty of perjury that he sent the subpoenas by first class mail. Motion for an order to compel subpoena duces tecum, pp. 2-3. Sending a subpoena by first class mail does not accomplish proper service of the subpoena. Firefighter's Institute for Racial Equality ex rel. Anderson v. City of St. Louis, 220 F.3d 898, 903 (8th Cir. 2000). Since the subpoena was not properly served, the court need not address defendants' other argument, i.e., that the materials sought were privileged, protected and irrelevant, although this argument is quite persuasive with respect to the need for discovery about defendants who have been dismissed from this action. The motion for an order to compel subpoena duces tecum is DENIED. (Docket # 97.) Since plaintiff's motion shows that his effort to serve the subpoenas was defective, there is no purpose in waiting for a reply brief that will be unable to overcome this threshold problem; accordingly, his motion for an open-ended extension of time to file his reply brief is DENIED. (Docket # 108.)

3. Plaintiff's Document Production Requests

Morris filed three motions to compel responses to document production requests. (Docket # 73, # 74, and # 75.) In his reply brief, Morris states that the parties were unable to resolve five document production requests. In ruling on those matters in dispute, the court considers the scope of discovery: "Parties may obtain discovery regarding any nonprivileged

1 matter that is relevant to any party's claim or defense . . ." Fed. R. Civ. P. 26(b). It is not  
2 necessary that the relevant information be admissible at trial "if the discovery appears reasonably  
3 calculated to lead to the discovery of admissible evidence." Id. The court now considers the five  
4 requests that remain in dispute.

5 The motion to compel as to request number 6 of plaintiff's first set of requests for  
6 production of documents is DENIED. The request for any document with the name of any  
7 member of the medical staff in the Pelican Bay SHU for a seventeen-month period is overbroad  
8 and unduly burdensome. Further, complying with this request would require an extraordinary  
9 amount of time to complete the necessary massive amounts of redaction of other inmates'  
10 medical information.

11 The motion to compel as to request number 7 of plaintiff's first set of requests for  
12 production of documents is DENIED. The request for any documents identifying the job  
13 positions and duties of all medical staff in the Pelican Bay SHU for a seventeen month period  
14 is overbroad and unduly burdensome. Further, as with request number 6, compliance with this  
15 request would require an extraordinary amount of time to redact other inmates' medical  
16 information.

17 The motion to compel as to request number 13 of plaintiff's first set of requests for  
18 production of documents is DENIED. The request for any documents identifying the addresses  
19 of everyone named in this action is overbroad and unduly burdensome.

20 The motion to compel as to request number 15 of plaintiff's first set of requests for  
21 production of documents is DENIED. The request does not request documents but instead  
22 requests information which plaintiff wants defendants to compile. If a plaintiff wants  
23 information, he should submit interrogatories rather than document production requests.

24 The motion to compel as to request number 23 of plaintiff's third set of requests for  
25 production of documents is DENIED. The request for rosters of names and job positions of  
26 medical staff at Pelican Bay during the seventeen-month period is deficient insofar as it seeks  
27 to have defendants gather information to prepare rosters. Insofar as it requests existing rosters,  
28 the burden of producing it would outweigh its likely benefit, considering the needs of the case.

1 See Fed. R. Civ. P. 26(b)(2)(C).

2  
3 C. Referral To Mediation Program

4 The court has a Pro Se Prisoner Mediation Program in which selected prisoner cases with  
5 unrepresented plaintiffs are referred to a neutral magistrate judge for mediation proceedings  
6 consisting of one or more conferences as determined by the mediator. The court referred this  
7 case to the mediation program in 2007, and it was unable to be resolved at that time. Now that  
8 the court has ruled on the dispositive motion, it may be helpful for the parties to again consider  
9 mediation. Good cause appearing therefor, this case is now referred to Magistrate Judge Vadas  
10 for mediation proceedings pursuant to the Pro Se Prisoner Mediation Program. The proceedings  
11 will take place within **90 days** of the date this order is filed. Magistrate Judge Vadas will  
12 coordinate a time and date for a mediation proceeding with all interested parties and/or their  
13 representatives and, within **five days** after the conclusion of the mediation proceedings, file with  
14 the court a report for the prisoner mediation proceedings.

15 The referral of this case to the mediation program does not affect the other dates set in  
16 this order. The dates for the close of discovery, case management conference and case  
17 management conference statements have been selected so that the case is ready for trial shortly  
18 after the mediation concludes if the mediation does not successfully resolve the case.

19 The clerk will send to Magistrate Judge Vadas in Eureka, California, a copy of the  
20 complaint, exhibits thereto and this order.

21  
22 D. Case Management Scheduling

23 It appears that this case is almost ready for trial. The court therefore schedules the  
24 following dates:

25 Defendants who remain in this action (i.e., defendants Winslow and Risenhoover) must  
26 file and serve an answer to the complaint no later than **October 3, 2009**. See 42 U.S.C. §  
27 1997e(g)(2).

28 All discovery must be completed by **November 3, 2009**.

1 A telephonic case management conference will be held at **3:00 p.m. on Wednesday,**  
2 **December 16, 2009.** Defense counsel shall initiate the conference call, and shall have plaintiff  
3 on the line before connecting the call to the court. No later than **December 4, 2009,** each party  
4 must file and serve a written list of his intended witnesses for trial. For each witness on his  
5 witness list, the party shall state briefly the testimony expected from that witness. One of the  
6 reasons for the witness list is that advance planning is necessary if witnesses need to be  
7 subpoenaed or, in the case of prisoner-witnesses, brought by writ of habeas corpus. The court  
8 will not issue writs or have subpoenas served unless plaintiff submits a proposed witness list in  
9 which he explains where each witness is located and what each witness is expected to testify  
10 about so that the court can determine whether each proposed witness is necessary and what  
11 needs to be done to bring him or her to the trial. Plaintiff is reminded that, for each non-prisoner  
12 witness who is not willing to show up voluntarily, plaintiff needs to subpoena the witness and  
13 must pay to that witness a witness fee of \$40.00 and travel expenses. See 28 U.S.C. § 1821(b)  
14 & (c). These fees cannot be waived by the court. Therefore, plaintiff needs to be able to explain  
15 at the case management conference the arrangements he has made to pay the fees and expenses  
16 of his witnesses.

17 Plaintiff's motion for an extension of time to file his opposition to the motion for summary  
18 judgment is GRANTED. (Docket # 100.) The court has considered plaintiff's opposition  
19 materials filed on March 11, 2009.

### 20 21 CONCLUSION

22 Defendants' motion for summary judgment is GRANTED in part. (Docket # 79.)  
23 Defendants Rowe, McGrath, Kirkland, O'Neill, Castellaw, Martinho-Hatter, Ricci, Garrett, Carr,  
24 Becker, Owen, Vail, Mills, Folsom, Aanerud and Worch are entitled to judgment as a matter of  
25 law in their favor. Defendants Risenhoover and Winslow are not entitled to summary judgment  
26 in their favor.


27 As to the other motions pending, the court has denied plaintiff's discovery motions  
28 (docket # 73, # 74, # 75, # 97, and # 108), denied his motion for appointment of counsel (docket

1 # 103), and granted his motion for an extension of time to file his opposition to the motion for  
2 summary judgment (docket # 100).

3 The court has referred the case to the Pro Se Prisoner Mediation Program for mediation  
4 within 90 days of the date of this order. The court also has set the following deadlines:  
5 defendants to file an answer no later than **October 3, 2009**; all discovery to be completed by  
6 **November 3, 2009**; case management conference statements to be filed and served by  
7 **December 4, 2009**, and a telephonic case management conference to be held at **3:00 p.m.** on  
8 **December 16, 2009**.

9 IT IS SO ORDERED.

10 Dated: September 9, 2009

  
\_\_\_\_\_  
SUSAN ILLSTON  
United States District Judge